Filed 2/1/05 Appendix not available in computer version.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CALIFORNIANS FOR DISABILITY RIGHTS, Plaintiff and Appellant, v. MERVYN'S, LLC, Defendant and Respondent.	A106199 (Alameda County Super. Ct. No. 2002-051738)

We deny a motion to dismiss an appeal upon concluding that Proposition 64, which imposes limits on private enforcement of unfair competition laws, does not apply to lawsuits filed before its effective date of November 3, 2004.

FACTS

Appellant Californians for Disability Rights (CDR) is a nonprofit corporation organized to protect the interests of persons with disabilities. On May 21, 2002, CDR filed a lawsuit against respondent Mervyn's, LLC (Mervyn's), a corporation that operates 125 retail department stores throughout the state of California.[1] CDR pleaded a single cause of action, seeking injunctive relief against alleged unlawful business practices by Mervyn's. (Bus. & Prof. Code, § 17200 et seq.) CDR claimed that Mervyn's denied store access to persons with mobility disabilities by failing to provide adequate pathway space between merchandise displays. CDR alleged that the business practices of

[1] Mervyn's was sued as Mervyn's California, Inc.; however, counsel for Mervyn's advises us that the correct corporate name is Mervyn's LLC.

Mervyn's were unlawful because they violated California's Unruh Civil Rights Act (Civ. Code § 51 et seq.) and California's Disabled Persons Act (Civ. Code § 54 et seq.).

The case proceeded to a bench trial in August 2003. The court denied relief to CDR and entered judgment in favor of Mervyn's on February 2, 2004. CDR appealed on April 1, 2004. While this case was pending on appeal, the voters of California amended the statute under which the case had been prosecuted. The voter's enactment, popularly known as Proposition 64, was passed by the California General Election on November 2, 2004, and went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 64 limits private enforcement of unfair business competition laws by providing that a private person may not bring a lawsuit unless he or she has suffered injury and lost money or property as a result of the challenged business practices, and meets the requirements for a class representative in a class action.[2]

On December 6, 2004, Mervyn's moved to dismiss this appeal upon the claim that Proposition 64's change in standing requirements applies to pending actions, and compels the dismissal of CDR's appeal of this private enforcement action. CDR filed its opposition to that motion on December 21, 2004, and we heard oral argument on January 25, 2005. (Cal. Rules of Court, rule 41.)

DISCUSSION

Business and Professions Code section 17200 et seq. prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice."[3] The unfair competition law, or UCL, "covers a wide range of conduct." (*Korea Supply Co. v.*

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[2] The complete text of Proposition 64 and all relevant portions of the Voter Information Guide, including the Legislative Analyst's analysis and the arguments of the proponents and opponents, are set forth in an appendix to this opinion. (Voter Information Guide, Gen. Elec. (Nov. 2, 2004) text of proposed law, pp.109-110; argument in favor of Prop. 64, p. 40; rebuttal to argument in favor of Prop. 63, pp. 40-41; rebuttal to argument against Prop. 64, p. 41.)

[3] All further statutory citations are to the Business and Professions Code, unless otherwise noted.

Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1143.) Before passage of Proposition 64, the UCL also authorized a wide array of enforcement actions. As the California Supreme Court observed in the year preceding passage of Proposition 64: "Standing to sue under the UCL is expansive . . . . Unfair competition actions can be brought by a public prosecutor or 'by any person acting for the interests of itself, its members, or the general public.' (§ 17204.)" (*Ibid.*)

In enacting Proposition 64, the voters found that the unfair competition laws were being "misused," and acted to limit private enforcement actions under the UCL. Proposition 64 retained public prosecutors' authority to bring UCL actions but struck the provision in section 17204 authorizing initiation of a complaint by "any person acting for the interests of itself, its members, or the general public," and substituted a provision for enforcement by "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Similarly, Proposition 64 amended section 17203, concerning UCL injunctive relief, to provide that a private person "may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 [i.e., actual injury] and complies with Section 382 of the Code of Civil Procedure" governing class actions.

Mervyn's contends that Proposition 64 applies to cases filed before the law's effective date of November 3, 2004, and compels dismissal of this appeal in a case initiated in May 2002 and tried in August 2003. We reject the contention.

"It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) Proposition 64 contains no express declaration of retrospectivity, as Mervyn's rightly concedes. Proposition 64 is wholly silent on the matter. The terms of the statutory amendments, the legislative analysis, and the ballot arguments make no mention as to whether Proposition 64 is meant to apply retroactively to preexisting lawsuits. The language used in the proposition and ballot materials also fails to provide any implicit indication that the electorate intended the law to be retroactive. If anything, the statutory

language and ballot materials suggest an intention that the law apply prospectively to future lawsuits. The voters' "Findings and Declarations of Purpose" contained in Proposition 64 express an intention to prohibit the "filing" of lawsuits by private parties uninjured by the challenged business practice. The ballot arguments likewise emphasize Proposition 64's effect on the filing of lawsuits. However, this isolated language is far from decisive as to the electorate's intent on the question of retroactivity. When read as a whole, the only fair conclusion is that the question of whether Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate.

A similar situation was presented in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, in which our Supreme Court held that Proposition 51 could not be applied to actions that accrued before the measure's effective date. Proposition 51, approved by the voters in 1986, "modified the traditional, common law 'joint and several liability' doctrine, limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault." (*Id.* at p. 1192.) The high court found that "a fair reading of the proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed." (*Id.* at p. 1209.) The principles that guided the California Supreme Court's interpretation of Proposition 51 guide our interpretation of Proposition 64, and dictate the same conclusion: "the absence of any express provision directing retroactive application strongly supports prospective operation of the measure." (*Ibid.*)

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265, fn. omitted.) California follows the same prospectivity rules as the United States Supreme Court. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.)

The California Supreme Court has explained that "[t]he presumption of prospectivity assures that reasonable reliance on current legal principles will not be

defeated in the absence of a clear indication of a legislative intent to override such reliance." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1214.) The requirement of clear legislative intent of retroactivity "helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." (*Landgraf v. USI Film Products, supra,* 511 U.S. at p. 268.) Unless there is "an express retroactivity provision, a statute will not be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos, supra,* at p. 1209, italics added.) " '[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " (*Myers v. Philip Morris Companies, Inc., supra,* 28 Cal.4th at p. 841, quoting *INS v. St. Cyr* (2001) 533 U.S. 289, 320-321, fn. 45.)

Mervyn's contends that a retroactive application of Proposition 64 would further the initiative's intent to stop misuse of the unfair competition law. But "[m]ost statutory changes are . . . intended to improve a preexisting situation and to bring about a fairer state of affairs." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1213.) Such a remedial objective is not alone sufficient to demonstrate a legislative intent to apply a statute retrospectively. (*Ibid.*) Contentions like Mervyn's overlook that "there are special considerations—quite distinct from the merits of the substantive legal change embodied in the new legislation—that are frequently triggered by the application of a new, 'improved' legal principle retroactively to circumstances in which individuals may have already taken action in reasonable reliance on the previously existing state of the law. Thus, the fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law." (*Id.* at pp. 1213-1214.)

Nor is it proper for this court to exploit the voters' silence on the question of retroactivity and impose its own view as to whether the remedial purposes of Proposition 64 warrant disrupting pending litigation. "[I]t was the electorate who made the policy

decision to implement a change in the [law], and thus it was the voters who possessed the authority to decide the policy question of whether the new statute should be applied retroactively." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1222.) This court "has no power to impose its own views as to the wisdom or appropriateness" of applying Proposition 64 retroactively. (*Ibid.*) Had the drafters, and voters, intended the initiative to apply retroactively, they could have so provided. They did not. The voters' silence on the issue of whether Proposition 64 is meant to have retroactive effect implicates the general presumption, unrebutted here, that the initiative applies prospectively.

Mervyn's acknowledges the long-standing rule that legislative enactments are applied prospectively, absent unequivocal contrary intent. However, Mervyn's argues that a different, and opposite, rule applies when statutory rights are at issue. Mervyn's relies upon cases holding that "a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute." (*Callet v. Alioto* (1930) 210 Cal. 65, 67; see Gov. Code, § 9606 ["Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."]) This holding is sometimes encapsulated by the principle that a " 'reviewing court must dispose of the case under the law in force when its decision is rendered.' " (*Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 12; accord *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829.)

The argument exposes a seeming conflict in canons of statutory interpretation. On the one hand, legislative enactments are presumed to operate prospectively. On the other hand, a court should apply the law in effect at the time it renders its decision, including recent statutory amendments. The United States Supreme Court has acknowledged this seeming conflict, and provided a reconciliation. (*Landgraf v. USI Film Products, supra,* 511 U.S. at pp. 263-280.) As the high court explained, the presumption of prospectivity is the controlling principle. (*Ibid.*; accord *Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1207-1208.) Legislative enactments are *presumed* to be prospective, but the presumption is rebutted if the enactment clearly indicates an intent that it be applied

retroactively. (*Landgraf, supra,* at p. 273.) If the statute indicates such an intent, and retroactive application will not violate constitutional provisions, then the new statute (the law in effect) is applied to pending cases. (*Id.* at pp. 267-268, 273.)

A case holding that the repeal of a statute terminates pending actions is not an exception to the prospectivity presumption, but an application of it. In those cases, the repeal of a statute indicated legislative intent that the repeal legislation apply retroactively, thus rebutting the presumption of prospectivity. Such cases also reflect an analytically distinct determination that the legislature had the *power* to retroactively affect pending litigation, because the rights being prosecuted were contingent statutory rights rather than vested rights, which implicate constitutional concerns. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1222-1224.)

In *Evangelatos*, our Supreme Court acknowledged a line of California cases applying statutory amendments to trials conducted after the effective date of the revised statute. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1222.) The court explained that cases applying the repeal or amendment of statutes retroactively do not displace the general principle of prospectivity applicable to all legislation. (*Id.* at p. 1224.) In those cases, "the language of the statute in question showed that the Legislature intended the measure to be applied retroactively," and the primary focus of concern was whether the Legislature had the constitutional authority to apply the measure retroactively. (*Id.* at pp. 1223-1224.) As the court emphasized in *Evangelatos*, "the question whether [a voter's proposition] may constitutionally be applied retroactively is quite distinct from the question whether the proposition should be properly interpreted as retroactive or prospective as a matter of statutory interpretation." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1224.) We are concerned solely with the question of whether Proposition 64 should be interpreted as retroactive. Unlike the cases Mervyn's relies upon, Proposition 64 does not show an unmistakable intent that its statutory amendments apply retroactively.

As an alternative argument, Mervyn's maintains that CDR's appeal should be dismissed even under a prospective application of Proposition 64. Mervyn's argues that

Proposition 64 establishes new procedural rules that are properly applied to all pending litigation. It is true that the rule of prospectivity generally applicable to statutes "does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. [Citation.] This is so because these uses typically affect only future conduct—the future conduct of the trial." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.)

However, Mervyn's argument is ill suited to the situation presented here. Dismissal of CDR's appeal would be a retroactive, not prospective, application of Proposition 64. The relevant question is not whether the statutory amendments to the UCL's standing requirements are best characterized as procedural or substantive. "In deciding whether the application of a law is prospective or retroactive, we look to function, not form. [Citations.] We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies." (*Elsner v. Uveges, supra,* 34 Cal.4th at pp. 936-937.) The relevant question is whether the law substantially affects existing rights and obligations. (*Id.* at p. 937.)

Dismissal of CDR's appeal would substantially affect CDR's rights. CDR filed this lawsuit in May 2002, over two years before passage of Proposition 64. At that time, CDR had the right to file and prosecute a UCL cause of action, and maintained that right through trial in August 2003. Dismissal of the appeal at this juncture would foreclose consideration of CDR's claims that it should have prevailed at trial, or is entitled to a new trial. Were Proposition 64 applied to pending appeals, as Mervyn's advocates, even those plaintiffs who prevailed at trial could be stripped of their judgments. It does not lessen the effect upon CDR's rights to observe, as Mervyn's does, that another plaintiff might be able to file an action against it for alleged unlawful business practices.

In determining whether a new law has retroactive effect, we must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." (*Landgraf v. USI Film Products, supra,* 511 U.S. at p. 270.) In making that determination, we are guided by "familiar

considerations of fair notice, reasonable reliance, and settled expectations." (*Ibid.*) Here, Proposition 64 imposes limits on private enforcement of the UCL by precluding the filing of a complaint by a private party who has not suffered injury in fact and lost money or property as a result of the challenged business conduct. The law, if applied retroactively, would sweep up all pending complaints by uninjured plaintiffs. The application of a new law restricting the filing of complaints to previously filed complaints would plainly constitute a retroactive application of the law. While the filing of a complaint may be characterized as "procedural," a "new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." (*Id.* at 275, fn. 29.)

Application of Proposition 64 to cases filed before the initiative's effective date would deny parties fair notice and defeat their reasonable reliance and settled expectations. In this case, the change in the UCL's standing rules denied CDR the opportunity to seek the intervention of a public prosecutor or to obtain the participation of a representative member of its organization who may have suffered monetary loss from the alleged unlawful business practices.

The disruption that would result from application of Proposition 64 to preexisting lawsuits should not be minimized. Plaintiffs who filed and prosecuted cases for years, like CDR, could suffer dismissal of their lawsuit at all stages of litigation. The prospect of such dismissals raises a host of difficult questions, including whether a plaintiff who did not allege actual injury is entitled to amend his or her complaint to make the allegation or substitute another party who was injured; whether a plaintiff may amend his or her complaint to add class action allegations; and whether any amended standing allegations relate back to the filing of the complaint so as to toll the statute of limitations. Retroactive application of a statute often entails difficulties in enforcement and unanticipated consequences, and should not be embarked upon where, as here, there is no indication that retroactivity was ever considered or intended by the voters. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1215.)

DISPOSITION

The motion to dismiss the appeal is denied.

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Sepulveda, J.

We concur:

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Kay, P. J.

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Reardon, J.

Trial Court	Alameda County Superior Court.
Trial Judge	Honorable Henry Needham, Jr.
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